No. 2859

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CHIN AH YOKE, alias Jane Doe,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE, on Habeas Corpus,

Appellee.

Petition for Rehearing

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To the Honorable Wm. B. Gilbert, Presiding Circuit Judge, and to the Associate Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

This appellant humbly presents herewith her petition for a rehearing herein based upon the premise that while this Honorable Court has decided that her claim of American citizenship may be deter-

mined without an adjudication in a Court before the Judicial Department of the Government of the United States, and further that the burden of proof of alienage did not rest upon the government, but on the other hand that the burden of proof of citizenship did rest upon the appellant, there yet remains unadjudicated and undetermined, in the opinion of appellant, all save one of the allegations of unfairness of the hearing before the Immigration authorities.

This high legal affirmation of the right to dispose of the sacred rights of American citizenship of one admittedly for many years part and parcel of our civic population in a purely administrative hearing without the protection and benefit of those legal safeguards which time and experience of past generations have deemed expedient and essentially necessary to surround our judicial procedure, we feel that all the more caution should be exercised to see that a full and fair hearing is accorded in the executive hearing.

In the case of U. S. v. Williams, 185 Fed. Rep. 698, Judge Holt speaks very clearly about hearings of this kind. He states:

> "It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the

> prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them, and if they are deprived of any such right the proceeding is clearly irregular, and any order of deportation isssued in it invalid."

Of the rights so accorded in the regulations, is the right to see all the evidence upon which the warrant of arrest is based. This is a most essential right. Yet in the present case the evidence upon which the Secretary of Labor is presumed to have acted in issuing the warrant was withheld and never shown to the appellant or her counsel. (See second point—appellant's brief, pages 28-36). The Government (Appellee's brief, pages 6 and 7) admits the fact, but seeks justification in the assertion that the evidence afterwards became immaterial. We take issue upon this point and maintain its greatest materiality and relevancy to the rights of this appellant to defend herself against the

charge of alienage brought against her. This appellant is ordered deported as an ALIEN on the presumption that she is a certain Wong Ah Moy, evidence of whose alienage is found in the record of her admission to the United States on October 7, 1912. Identity was in issue. If this appellant was not this Wong Ah Moy, there was no evidence of alienage to overcome the prima facie exparte case of citizenship made out by the appellant. Evidence that this appellant was in the United States upwards of a year prior to October 7th, 1912, would conclusively show that she was not the Wong Ah Moy in question. This identical evidence and of sufficient weight and materiality to cause the Secretary of Labor to issue a warrant of arrest on June 17th, 1911, was in the hands of the local Commissioner of Immigration. This appellant called for it to make affirmative use thereof, as evidence in her own defense. This was doubly her right; first because it was the evidence upon which the warrant of arrest herein was issued, and secondly, because it was evidence material and sufficient to be submitted by her on her behalf to prove she was not Wong Ah Moy. Yet it was refused. It is conceded that the local Commissioner fianlly determined this issue here in San Francisco by himself, withholding the evidence in question, and never exhibiting it to this appellant so that she could either affirmatively answer it, or make use of it in her defense, nor was it finally submitted to the Secretary

in this case. In this action we feel the regulations have been violated and the appellant unduly hampered in making her defense and in submitting evidence on her own behalf. In Low Kwai vs. Backus, 229 Fed. 481, this court held that the power to determine the weight and sufficiency of evidence to issue a warrant of arrest was placed by the statute on the Secretary of Labor, and he could not delegate that power to an inferior officer. How can that holding be reconciled with what was done in the present case? Evidence sufficient and material enough to cause the Secretary of Labor to issue this warrant of arrest is, on the judgment alone of the local Commissioner, laid out the case finally and entirely. The defendant could neither inspect it, meet it, answer it, or avail herself of the material benefit which its possession would bestow upon her as showing affirmatively that she had been identified as having been in the United States for upwards of a year before Wong Ah Moy entered the United States, and hence, that no matter how much she might resemble her, she was not in point of fact this said Wong Ah Moy. It is no answer to say that in theory, if not in fact, this evidence was before the Secretary when he issued the warrant of arrest. That was many months before. Its non-availability when the case was determined, when it was decided that this appellant was Wong Ah Moy, and not Chin Ah Yoke, was the prejudicial point. Here was evidence most material to the defendant

purposely laid out of her case, which was condemned when unintentionally done by this court In re Cam Pon, 168 Fed. 479, in an admission proceeding. This court has now held that one physically present within our borders as part and parcel of our population, has no greater rights, even when citizenship is involved, than one without our borders seeking either admission or re-admission. Yet in the actual practice of the immigration authorities the holding of the court is to accord them NOT EVEN EQUAL, but MUCH LESS RIGHTS than the applicant without our borders, as contended for in the Third Point of Appellant's brief (pages 37-45). No applicant for admission or re-admission can submit his case on affidavits. All the witnesses are called for and must be presented for verbal examination. The cases are set and re-set until all the witnesses appear and are fully verbally examined. In this manner the truth or falsity of the claim is determined by the help of a rigid verbal examination of the witnesses. The aids afforded by such an examination are as much the right of the applicant for admission, when in his favor, as the right of the government when adverse to the applicant. To reject the claim of citizenship made out by the affidavits without verbally examining the witnesses, is to summarily and arbitrarily deprive the appellant of such a hearing as would, as of course, be accorded a like applicant for admission.

It is respectfully submitted that a rehearing should be accorded herein for the reasons herein stated.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded and is not interposed for delay.

GEO. A. McGOWAN,
Attorney for Appellant.